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IN THE

# *Supreme Court of the United States*

OCTOBER TERM, A. D. 1940

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ANNA SCHOMMER, JOHN J. HOROWITZ and MILTON M. ADELMAN, Owners of Certain first mortgage five per cent gold bonds of Chicago Railways Company and Chicago City Railway Company,

*Petitioners,*

VS.

JAMES H. WILKERSON, Judge of the District Court of the United States, for the Northern District of Illinois, Eastern Division, and the other Judges and Officers of said Court,

*Respondent.*

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**PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SEVENTH CIRCUIT, UNDER TITLE 28, SECTION 240 OF UNITED STATES JUDICIAL CODE AND BRIEF IN SUPPORT THEREOF**

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**PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SEVENTH CIRCUIT, UNDER TITLE 28, SECTION 240 OF UNITED STATES JUDICIAL CODE**

---

*To the Honorable, the Judges of the Supreme Court of the United States:*

**A. Summary Statement of the Matters Involved.**

Petitioners are the owners of bonds aggregating $16,000 secured by two trust deeds of the Chicago Railways Company, an Illinois Corporation, and the Chicago City Railway Company, an Illinois Corporation, respectively. The Harris Trust & Savings Bank, an Illinois Corporation, trustee in the Chicago Railways Company trust deed named, when the bonds became due on Feb-

ruary 1, 1927, filed foreclosure proceedings, Equity Case No. 6839, on February 2, 1927, in the Federal District Court of Illinois, and on its motion had three receivers appointed for the mortgage property (Ry. Rec. 85-406). These receivers were the same receivers that had theretofore been appointed by the same court on the motion of a foreign creditor who, with debtor's consent, had previously on December 15, 1926 filed a creditor's bill against the mortgagor—Equity Case No. 6686 (Ry. Rec. 407-444). The two cases were consolidated in the foreclosure and the creditor-plaintiff in the first suit became a party defendant and answered in the second (Ry. Rec. 407-426).

The franchise ordinance under which both companies were reorganized in 1907 to operate the surface car lines in the City of Chicago (158 Fed. 913 and 923) having expired by its terms with the maturity of the mortgages in question, the two railway companies entered into an arrangement with one, Samuel Insull, who controlled the Chicago Rapid Transit Company, which owned and operated the elevated lines in the City of Chicago, for a reorganization of the surface lines and consolidation with the elevated properties (Ry. Rec. 2221, *et seq.*).

In furtherance of this plan, known as the Insull Plan, the First National Bank of Chicago, an Illinois Corporation, trustee in the Chicago City Railway Company trust deed named, following the same form and procedure as in the Railway case, filed foreclosure proceedings in the Federal District Court, Equity Case No. 9915, for the balance due on the bond issue secured thereby on July 9, 1930 (City Ry. Rec. 541-1000). Upon its motion, receivers were appointed for the mortgaged properties who were the same receivers who had theretofore been appointed in a creditor's suit previously filed on July 7,

1930—Equity Case No. 9913 (City Ry. Rec. 1001-1014). On motion of the creditor-plaintiff, with the consent of the mortgagor, the creditor's suit was consolidated in the foreclosure and the creditor-plaintiff in the first suit was made defendant and answered in the second (City Ry. Rec. 1005-1014).

The trustees and bondholders' protective committees of both the senior and junior securities, which committees had theretofore been organized under identical written deposit agreements dated February 1, 1926, which agreements by their terms were about to and did expire on February 1, 1931 (Ry. Rec. 3901, *et seq.*), agreed to the Insull Plan of reorganization and the franchise ordinance passed pursuant thereto. The District Court thereupon, on May 11, 1931, on motion of the parties to the litigation, there being no contest, entered decrees of foreclosure and sale in the above cases in the usual form. These decrees, among other things, by definition made the bondholders parties thereto (Ry. Rec. 2987-3053).

By the terms of the 1930 franchise ordinance the promoters of the Insull Plan were required, but failed, to meet certain conditions. Time for performance was extended from time to time until 1934, when, for failure to meet these requirements, the City of Chicago declared the grantees to be in default and cancelled the proposed 1930 franchise (Ry. Rec. 4990).

Subsequently, in an effort to reorganize the mortgage properties and terminate the foreclosure proceedings, the District Court on its own motion, on July 12, 1935, appointed (Ry. Rec. 3821) certain persons known as the Abbott Committee to formulate a plan of reorganization, which they did (Ry. Rec. 3939). The District Court thereupon, on motion, ordered a sale of the mortgage property, to be held under the May 11, 1931 decrees,

which was done. The mortgage properties were on May 29, 1936 sold at this sale to the Abbott Committee by a Special Master appointed by the District Court for the cash on hand; namely, $30,000,000 (Ry. Rec. 4639).

The bondholders' protective committees of both senior and junior securities, having been allowed to intervene, and the trustees of the various mortgages having approved the terms of the sale under the Abbott Plan of reorganization, the District Court, on November 21, 1936, overruled all objections of dissenting bondholders to the same (Ry. Rec. 4792, 4824), approved the fairness of the plan and the adequacy of the price, and denied a petition for reorganization under Section 77B of the Bankruptcy Act (Ry. Rec. 4802-3) in accordance with a written memorandum on that day filed (Ry. Rec. 4792), and entered a formal order on December 16th, 1936 in accordance therewith (Ry. Rec. 4824, *et seq.*). The final confirmation of the sale was, however, continued only to enable the committee to negotiate for a franchise with the City of Chicago.

The City of Chicago, however, refused to grant any franchise ordinance to the Abbott Committee unless its plan conformed to the 1930 Insull Plan and included therein the property of the elevated lines owned by the Chicago Rapid Transit Lines, which had since the promulgation of the Insull Plan been adjudged a bankrupt in the District Court. This, the Abbott Committee refused to do (Ry. Rec. 5027). Thereupon on December 17, 1937 appointed on its own motion one, Walter A. Shaw (Ry. Rec. 5164), to negotiate a consolidation of the local transportation facilities of the City of Chicago, including the elevated lines, and an ordinance to operate these properties, which he proceeded to do (Ry. Rec. 5529, *et seq.*). Shaw recommended a consolidation with the elevated properties along lines similar to the

Insull Plan, except that there was no provision made for secondary financing, which the Insull Plan contained. He allocated $7,000,000 of the first mortgage bonds, $32,-500,000 in preferred stock, and 1,100,000 shares of common stock in the new company proposed by him to be organized to take over the property. The trustees' and bondholders' protective committees of both senior and junior securities three years later, under the lash of the District Court, consented to this modification of the Abbott Plan and the same was declared operative by the District Court on May 15, 1939 (Ry. Rec. 5363).

In connection with Shaw's appointment the District Court ordered the receivers to pay him $2500 a month (Ry. Rec. 5205), which he has received and still continues to receive in addition to other compensation for his staff and office expenses. The sum so paid Shaw, on December 20, 1939 amounted to $200,000, when the District Court entered an order *nisi* for an additional allowance of $20,000, to become effective within ten days therefrom unless objections were filed thereto (Ry. Rec. 6583-4), which petitioners did on December 26, 1939 (Ry. Rec. 6585-6). Their objections were stricken on January 4, 1940 (Ry. Rec. 6589) because filed without leave, on motion of Shaw's attorney. Petitioners subsequently attempted to obtain leave to file their petition, on January 10, 1940, but said petition questioning the propriety of Shaw's appointment and payment, was also denied (Ry. Rec. 6605-6).

The Chicago Surface Lines, Inc., a new company organized by the Abbott Committee to take over the questioned properties, was required and did submit itself to the jurisdiction of the District Court and its order approving the plan of reorganization (Ry. Rec. 6202-09, 6231-5, 6238-0).

The said Abbott Plan, as amended and agreed to by

all the parties of record in said causes and approved by the Respondent, provides for the following capitalization:

| | |
|---|---|
| 1st Mortgage Bonds, Series A | $72,718,350.00 |
| 1st Mortgage Income Bonds, Series B | 7,002,290.00 |
| Preferred stock: (1,965,701.55 shares) aggregate par or declared value | 98,785,067.78 |
| Common Stock, no par value (shares) | 2,685,319.59 |

which is to be distributed as follows:

| | |
|---|---|
| To 1st Mortgage Bondholders, Chicago Railways Company 1st Mortgage Bonds, Series A | 41,741,250.00 |
| Chicago City Railway Company 1st Mortgage Bonds, Series A | 27,644,550.00 |
| Calumet & South Chicago Railway 1st | 3,332,550.00 |
| To Trustees, Chicago Rapid Transit Co. 1st Mortgage Income Bonds, Series B | 7,002,290.00 |
| Preferred par value | 33,463,802.00 |
| Common Stock (shares) | 1,105,802.00 |
| To Chicago Railway & Chicago City Railway & subsidiary juniors, Preferred stock | 62,821,465.78 |
| Common Stock (shares) | 1,579,717.59 |

The receiverships in both cases have been unnecessarily long and expensive, extending over a period of more than thirteen years. Theirs, to a large extent, has been a work of supererogation. The corporations and their staffs and the Board of Supervising Engineers, the operating agency created by and existing by virtue of the Unification Ordinance of 1914, and its staff, have been maintained as before the receiverships. The receivers were used as delaying instrumentalities to keep the first mortgage bondholders from collecting their money from the mortgagor and their distributive share of the money and property covered by trust deeds. In addition to the permanent improvement and long term obligations contracted for, the receivers under the court's order have paid to themselves and the other court attachés in excess of $2,500,000 in fees and expenses, as follows:

| | | |
|---|---|---|
| Blair (as Receiver to 12/28/31) | $110,000 | |
| " (as Pres. Surface Lines) | 300,000 | |
| " (as Receiver in full to 2/15/32) | 100,000 | |
| " (as President Surface Lines to 2/15/30) | 600,00 | |
| | 570,000 | |
| Rawson (as Receiver to 12/28/31) | 104,000 | |
| " (as Receiver to 2/1/33) | 125,000 | |
| | 229,000 | |
| Hupp (Sec'y to Receivers to 12/28/31) | 87,000 | |
| (Sec'y to Receivers to 12/30/39) | 21,250 | |
| | 180,250 | |
| Sheean (Att'y for Receivers to 12/28/31) | 224,000 | |
| " (Att'y for Receivers to 12/30/39) | 70,000 | |
| | 294,000 | |
| Kirkland (Att'y for Receiver to 12/38/31) | 107,000 | |
| (Att'y for Receiver to 12/30/39) | 70,000 | |
| | 177,000 | |
| Forman, Bluford, Krinsley & Shults Attorneys for Chgo. Title & Trust Co. depositary | 10,000 | |
| Mitchell (Receiver) | 50,000 | |
| Walter Fisher (Court adviser) | 205,000 | |
| Horace K. Tenney (att'y for first mortgage Trustee) | 125,000 | |
| Walter A. Shaw (court adviser 12/9/37 to 12/27/39) | 220,000 | |
| Busby (Receiver 7/7/30 to 9/9/30) | 10,000 | |
| Hurley (receiver 10/10/30 to 12/8/33) | 130,000 | |
| Weber (attorney for Receiver to 12/14/38) | 130,000 | |
| Weber (attorney for company 10/1/28 to 5/25/30) | 5,000 | |
| | 135,000 | |
| Wilson & McIlvane (attorneys for first mort. trustee) | 35,000 | |
| Arthur Kracke (special tax counsel) | 164,000 | |
| Peat, Marwick & Mitchell (tax accountants) | 34,070.43 | |
| Brown (Receiver) | 80,000 | |
| Fleming (Receiver) | 90,000 | |
| Burry Johnstone Peters & Dixon (attorneys for junior mortgage trustee) | 42,500 | |
| Peden (special master for sale) | 2,500 | |
| Gale Blocki Estate (Att'y for South Side companies) | 1,200 | |
| Abbott (Chairman Committee) | 10,000 | |
| Sidley (counsel Abbott Committee) | 6,500 | |
| Jirgal (Accountant Abbott Committee) | 4,000 | |
| Abbott Plan (printing expense) | 16,470.84 | |
| Grossman (special master) | 3,000 | |
| Shaw (special master 2/15/38) | 3,977.28 | |
| Hammond (accountant 1/29/31) | 5,702.00 | |
| Wisner (accountant 1/29/31) | 6,540.00 | |
| | $2,790,710.55 | |

## B. Reasons Relied On for the Allowance of the Writ.

1. The ruling of the Circuit Court of Appeals is inconsistent with *Gregory* v. *Pike,* 67 Fed. 837, 6; *Howard*

v. *Shinn,* 190 Fed. 940; *Toler* v. *Tenn. R. Co.,* 67 Fed. 168, 171, and *Williams* v. *Morgan,* 111 U. S. 684.

2. The Circuit Court, in the instant case, erroneously construed and misapplied the law in *Shaw* v. *R. Co.,* 100 U. S. 605, and *Richter* v. *Jerome,* 123 U. S. 233, as controlling.

3. In sustaining the District Court's denial of petitioners' right to question the illegal disbursement by the receivers to Shaw of funds from the trust estate, the Circuit Court has so far sanctioned the departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this court's supervisory power.

4. In refusing to review the action of the District Court after the entry of the decrees of foreclosure and sale, approving a sale under an illegal plan of reorganization, subject to an ordinance, and postponing final disposition thereof upwards of nine years, the Circuit Court has departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this court's supervisory power.

WHEREFORE, petitioners pray that this Court issue a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit directing it to certify to this court for its review and determination on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on its docket, being No. 7234, and that the decree of said court may be reversed by this court; and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem proper.

Respectfully submitted,

CHARLES P. SCHWARTZ,
*Attorney for Petitioners.*

## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

### Opinion of the Court Below.

The opinion of the Circuit Court of Appeals is printed in the record (Tr. 80-6). It is also reported in 112 Fed. (2d) 311.

### Jurisdiction.

1. The United States Judicial Code, Title 28, Section 240, is relied on to give jurisdiction.

2. The order sought to be reviewed was entered May 21, 1940.

3. Aggrieved by a nine years' delay in the execution of the May 11, 1931 decrees of foreclosure and sale (Ry. Rec. 2987 *et seq.*), three years' delay in the final formal approval or disapproval of the Master's June 19, 1936 Report of Sale (Ry. Rec. 4025), under an illegal plan, and a thirteen-year receivership at a cost to date in fees of more than $2,500,000, petitioners obtained leave to file, and on February 23, 1940 filed their sworn petition for a peremptory writ of mandamus in the Circuit Court for the Seventh Circuit under the Judicial Code, Section 262 (Tr. 1-27). The Honorable James H. Wilkerson, Judge of the District Court presiding, and the other judges of that district, were named respondents, who, having answered (Tr. 27-29), the Circuit Court on May 21, 1940 denied petitioners' application for relief (Tr. 87).

The Circuit Court's opinion disposed of petitioners' application on its merits. It held that the bondholders had not as of right, the right in the District Court to intervene, even after decree, either to protect their dis-

tributive share of the trust estate against any depredation or diminution by the receivers acting under court order, or on appeal to the Circuit Court under Judicial Code Section 262, to speed the execution and enforcement of the decrees of sale, or before final action by the District Court to compel the District Court to disapprove a sale based on an illegal and unsupportable plan of reorganization.

4. Cases believed to sustain the jurisdiction are *McClelland* v. *Carland,* 217 U. S. 268; *Speer* v. *Rural Special School District,* 100 Fed. (2d) 202; *Bedgisoff* v. *Cushman,* 12 Fed. (2d) 667.

## Statement of the Case.

As a statement of the case is given under the heading A in the petition reference is made thereto to avoid repetition.

## Specification of Errors.

### I.

The Court erred in holding that the District Court acted within its discretion in refusing petitioners' right to file objections under its *nisi* order allowing WALTER A. SHAW an additional $20,000 for attorney's fees and expenses in the foreclosure receiverships.

### II.

The Court erred in holding that the District Court acted within its discretion in refusing petitioners leave to intervene to question the propriety of its order providing for the appointment of WALTER A. SHAW as court adviser and for his compensation as such by the Receiver.

III.

The Court erred in holding as untimely petitioners' request to control the District Court's action in delaying the execution of the two questioned decrees of foreclosure and sale entered some nine years before and postponing the final approval or disapproval of the Master's sale thereunder, tentatively approved on June 19, 1936, until after the successful bidders secured a franchise ordinance from the City of Chicago.

IV.

The Court erred in refusing to review, in advance of the passage of said ordinance by the City of Chicago, the inadequacy of the purchase price of the bidders at the sale and the fairness of the plan of reorganization theretofore approved by the District Court.

V.

The Court erred in denying petitioners' application for relief and its action in that respect was contrary to law and in contravention of the Fifth Amendment to the Constitution of the United States, in that in effect, it deprived petitioners of their property, represented by their distributive share of the trust estate, without a hearing.

## ARGUMENT.

### A.

**Where the District Court delays the execution of a foreclosure decree for more than nine years to promote an illegal plan of reorganization and secure a franchise to operate the properties, and to the same end continues the wasteful operation of the mortgage properties by the Receivers for more than thirteen years, the Circuit Court under Section 262 of the Judicial Code should on relation of a bondholder compel the immediate execution of the decree and control the illegal expenditures of the trust estate by the Receivers.**

The power of the Circuit Court of Appeals, under Section 262 of the Judicial Code, to issue a writ of mandamus in aid of its appellate jurisdiction in the two questioned foreclosures must be conceded. *McClelland* v. *Carland,* 217 U. S. 268; *Speer* v. *Rural Special School District,* 100 Fed. (2nd) 202-5; *Barber Asphalt Paving Co.* v. *Morris,* 132 Fed. 945, 3; *Greyerbiehl* v. *Hughes Electric Co.,* 294 Fed. 802; *Whittel* v. *Roche,* 88 Fed. (2d) 366. The only remaining question therefore is whether the admitted facts set out in the petition and answer state "special circumstances" sufficient to justify the departure from the regular procedure in reviewing the action of the District Court. *Minnesota & Ontario Paper Co.* v. *Molyneaux,* 70 Fed. (2d) 545.

The special circumstances relied on to invoke the aid of the Circuit Court were: (1) nine years' delay in the execution of the two questioned foreclosure decrees of sale and the continuance of the foreclosure receiverships upward of thirteen years; (2) illegal and unreasonable allowance of fees paid by the receivers aggre-

gating in excess of $2,500,000 to promote an illegal plan of reorganization, and (3) prolonging the litigation uselessly and the prohibitive cost of appeal. *Spiller* v. *R. Co.,* 253 U. S. 117.

1. Respondent's nine years' delay in the execution of the two questioned foreclosure decrees of sale to enable certain bondholders to buy in the property under an illegal plan of reorganization and obtain a city ordinance to operate is unreasonable and will be controlled by mandamus. *Bedgisoff* v. *Cushman* (*supra.*)

Respondent (Ry. Rec. 6553) said that the only reason for the thirteen-year receivership and nine years' delay in the execution of the two questioned foreclosure decrees was his desire to secure the adoption and approval of a plan that would prevent the first mortgage bondholders from getting everything and to give something to the junior security holders.

The petition alleges that the mortgage property is scarcely sufficient to pay the first mortgage indebtedness. The first mortgage bonds are selling currently on the market at less than half. The value of the mortgage properties on this basis leaves nothing for the junior securities. *Denver Union Stock Yards* v. *U. S.,* 304 U. S. 470.

In the face of the mortgagors' insolvency and the inadequacy of the security, respondent's actions and that of the trustees and Protective Committees has been held, in law, if not in intent, fraudulent.

*First National Bank* v. *Flershem,* 290 U. S. 504, when read in connection with the decision in *Case* v. *Los Angeles Lumber Company,* 308 U. S. 106, clearly establishes the illegality of the plan of reorganization in the case at bar and respondent's effort to force it upon the first mortgage bondholders and the city by prolonging the

receivership and delaying the execution of the decrees of sale.

Mr. Justice Douglas, in *Case* v. *Los Angeles Lumber Co.* (*supra*), said:

> "The rigorous standards of the absolute or full priority doctrine of the *Boyd* case will not permit valueless junior interests to perpetuate their position in an enterprise on such ephemeral grounds."

(*a*) The admitted purpose of protecting the junior securities against the first mortgage creditors does not entitle respondent to deal with the mortgage property in contravention of settled law and the rights of the mortgage creditors to be paid or in the alternative to have the security applied forthwith in accordance with the terms of the two questioned foreclosure decrees.

A foreclosure receivership is special and not general. It is limited to the preservation of the trust estate pending the timely termination of the proceedings. *Du Parquet* v. *Evans,* 297 U. S. 216.

(*b*) Not only was the purpose to give the juniors something out of the security before the first mortgage creditors were paid in full, illegal, but the purchase price for the amount of cash on hand with nothing bid for the physical property was also illegal as held in *First National Bank* v. *Flershem* (*supra*).

2. Respondent's thirteen years' extension of the receivership at a cost to the mortgage estate in excess of $2,500,000 in fees and particularly the allowance of $220,000 to the court adviser is unreasonable and should likewise be controlled.

Here we have a case where two street railway companies faced with expiring franchises and first mortgages maturing simultaneously with the franchises, by agreement with simple creditors secure a protective Fed-

eral receivership. The presidents of the railway companies and representatives of the first mortgage trustees, respectively, were appointed receivers. Counsel for the companies were appointed counsel for the receivers. Other counsel for the company and receiver and special counsel for the court were also appointed. Negotiating committees and counsel, accountants, and finally a court adviser and counsel were appointed. The court, without hearing or schedule of hours or notice ordered that all these attachés as well as counsel for the trustees of both the senior and junior securities to be paid by these receivers and they were paid as we have shown on account in excess of $2,500,000. The last allowance to the court adviser and his counsel is, among others, the subject matter of petitioners' complaint. His compensation was questioned in objections filed in accordance with respondents' *nisi* order. They were, however, stricken on purely technical grounds and their attempt to meet these objections by notice and motion to file an intervening petition, was likewise denied on the ground that the matter had previously been passed upon.

(*a*) The intervening petition sought to stop further depredation of the trust estate and to recover the money already paid on the ground that the payment was both illegal and excessive. Petitioners' right to question these payments is based on the right to share in the trust estate and this right is defeated if they are denied the right to intervene for that purpose and compelled to await a review of this ruling upon final determination and disposition of the pending motion to approve the Master's sale made in 1936.

Surely the appointment of a court adviser even if it were legal on the untenable ground that the court needed help to advise him as to the fairness of the sale price or plan under which the sale was made, can have

no possible application in the *instant* case after respondent had already overruled all objections and approved the fairness of the sale price and plan.

The court was obviously not looking for information or advice from his adviser, but for an ordinance. Even Shaw admits that he did not make an independent study, survey or appraisal, but accepted the data already available and merely brought it up to date.

The Abbott Plan as amended asks the first mortgage bondholders who put in the only cash that went into the 1907 reorganization not only to release their $30,000,000 and to carry the junior securities into the new company, but to take over the broken-down and bankrupt elevated lines that don't even meet their operating costs.

(*b*) The litigation represents one of the "sordid chapters" in "the history of fees in corporate reorganizations." *Dickinson* v. *Cowan,* 84 L. Ed. 553.

The record is replete with instances where conflicting interests are represented by the same person. Salaries to officers and directors of the defunct corporations and disbursement to the reorganizers and their counsel were paid fees and expenses in no legal sense connected with the foreclosure litigation. What possible basis is there, for example, for the payment of $42,000 to a firm of lawyers representing the Consolidated Series A bonds of the Chicago City Railways Company (C. Ry. Rec. 4275-2), or for the payment of fees to the chairman of the Abbott Committee and his counsel or for the payment of the committee's expenses in connection with their effort to promote a plan of reorganization (Ry. Rec. 4840)? Similarly, the hundreds of thousands of dollars paid to court advisers.

(*c*) The Circuit Court's refusal to control this reckless expenditure certainly deprives petitioners of their property without due process. There is no appeal from

respondent's order denying intervention, and to require them to wait until the matter is finally disposed of, if that time comes within their lifetime, would defeat their right to question respondent's action. It would be like locking the barn *ex post facto.*

In *Merch. Loan & Tr.* v. *Chi. Rys. Co.,* 158 Fed. 923, 928, the Circuit Court of Appeals for the 7th Circuit, in avoiding a similar attempt by respondent's predecessor Judge Grosscup to compel a reorganization also of his making said:

> "It appears from the discussion that this whole scheme is predicated upon the fact that the physical condition of the city railway system on the north and west sides is poor; that it needs improvement; that the interests there are conflicting; that franchises are expiring, or have expired; rights are mingled and perhaps confused; and the order proceeds upon the theory that it is best for all that these separate liens and separate corporate interests shall be merged in one corporation, whose duty it shall be to borrow money enough to put the physical property in good condition. Now, that may be a wise business proposition, and if the court had power to take hold of these things and do for the people, who are mortgage bondholders, that which it thinks best for them, we might have no hesitation in sustaining this; but every man in this country decides questions in respect to his own property for himself. Life, liberty and the pursuit of happiness are guaranteed to each one. They are inalienable rights, and although a man misjudges what is best for him, that fact gives no court the right to compel him to act otherwise. * * * No man is compelled to turn his property over to the control and management of another. At least the courts are not authorized; except in the case of insanity or imbecility, to take one person's property, and put it into some one else's care to determine what is best for it."

(*d*) Good intentions will not condone or bar review of respondent's illegal conduct (*Wilgus* v. *Shapiro,* 287 U. S. 351) in prolonging the receivership upwards of thirteen years.

In *Gordon* v. *Washington,* 295 U. S. 30, the court held that receivership is only a means and not an end in itself.

In *Michigan* v. *Trust Co.,* 286 U. S. 334, the court condemned as unreasonable a four years' delay.

In *First Fed. Trust* v. *First Nat'l Bank,* 297 Fed. 353, the court condemned a three and one-half year receivership within which to wind up a business.

In *Wabash R.* v. *R. R. Co.,* 197 Fed. 442, four years' receivership was condemned.

In *Taylor* v. *Ry. Co.,* 9 Fed. 1, an eighteen months' delay in a foreclosure was condemned. These cases followed the rule laid down in *Minot* v. *Mastin,* 95 Fed. 734, to the effect that a receivership must not be unreasonably continued. See also for application of rule to injunctions, *Continental Bank* v. *C. R. I. & P. R. Co.,* 294 U. S. 648, 684-5.

In *Guaranty Trust* v. *Union Traction,* 158 Fed. 913, the same District Court held that these mortgages were to be distinguished from railroad mortgages secured by a private right of way and not dependent for its life on the will of the city in which it operates. In this case the old franchise, having expired by its terms, can give no standing to the security as a utility until a new franchise is granted.

**B.**

**Respondent's answer, by not denying the prima facie case and the facts in the petition alleged, admits them to be true.**

High on Extraordinary Legal Remedies, Section 460, Page 445.

Ferris on Extraordinary Remedies, (1926) Sec. 6.

In *People* v. *Kilduff,* 15 Ill. 493, 502, the court said:

> "Every intendment is made against returns which do not answer the important facts. Tapping on Mandamus, 349-350, *et seq.*"

*City of Chicago* v. *People,* 215 Ill. 235, 7.

1. A previous demand on respondent or his knowledge of such demand upon the trustees, was not a prerequisite to the prayed-for relief. The parties are charged with a knowledge of the law and respondent with its execution. Moreover, the record shows that such a demand would have been a useless formality. It was therefore unnecessary.

*Virginia* v. *Reeves,* 100 U. S. 313, and
*People* v. *Green,* 281 Ill. 52, 58.

In *U. S.* v. *Auditors,* 8 Fed. 473 (Ill. C. C.), Drummond, C. J., in dispensing with the requirement of previous refusal, said:

> "But while it is generally true that a court will not issue a mandamus to compel the performance of an act, which it is merely anticipated that defendant will not perform, still if the defendant has shown by his conduct that he does not intend to perform the act, and that fact is apparent to the court, it would be a work of supererogation to require that a demand should be made for its performance."

In High, *supra,* Section 13, page 19, the author says:

> "And if the record clearly discloses an intention upon the part of respondents not to perform the act required, and that a demand, if made, would be a useless formality and wholly unavailing, it is not necessary that a demand should have been made."

(*a*) Respondent's allegation that he at all times exercised his best judgment and discretion in everything connected with the litigation is insufficient, since respondent did not specifically answer the petition.

In *High, supra,* Section 479, the author says:

> "* * * when officers are entrusted by law with the performance of certain duties of a public nature and are authorized and required to do such matters and things in carrying on their duties as they may from time to time deem necessary, upon mandamus to compel their action, they cannot by way of return merely rely upon their discretionary powers and allege that they have done what they deemed necessary without specifying what they have done."

C.

**Petitioners' right of appeal and to come into the proceedings after decree and sale, by whatever name, is absolute.**

*Williams* v. *Morgan,* 111 U. S. 684.

*Securities &c* v. *U. S. R. & Imp. Co.,* 84 L. Ed. 766.

(1) Petitioners' right to come into the proceedings after decree and sale stands on an entirely different ground than that of the bondholder to do so before decree. In the one case they come in after the case is ended to protect their distributive share. In the other case they seek to direct the litigation.

In *Gregory* v. *Pike,* 67 Fed. 837, 846, the court said:

> "This question of making defendants is entirely

> different from that of intervention *pro interesse suo.* * * * This question has no relation to so-called 'class suits' nor to the coming in of a *cestui que trust* or a stockholder * * * where new parties come into the accounting after a decree. In none of these are the issues presented by the bill substantially changed by the interposition of new parties."

See also:

> *Howard* v. *Shinn,* 190 Fed. 940.
> *Toler* v. *Tenn. R.,* 67 Fed. 168, 171.

(2) Moreover, petitioners, being parties under the express terms of the decree, were entitled to file the objections to the allowance of fees and the petition to vacate Walter A. Shaw's appointment as well, and by the same token had the right of appellate review and the right, under the special circumstances of this case, to invoke the powers of the appellate tribunal under Section 262 to protect it.

Decrees of Foreclosure and Sale of May 11, 1931 provide (See Case No. 6839, Ry. Rec. 3045-6 and also a like provision in Case No. 9915):

> "As used in this decree the term 'party' to the above entitled causes or any thereof is intended and shall be deemed to mean and include all holders of bonds issued under and secured by any mortgage or other instrument herein foreclosed or enforced."

(3) As to the alleged petitioners' failure to show when they acquired their bonds, respondent's answer makes no issue as to the petitioners' holdings or the time of their acquisition. Moreover no such objections were raised at the hearing below on the motion of January 4th or 10th. The District Court denied the motion on technical grounds only. The suggestion, even if material, cannot be considered on the record in this pro-

ceeding, at least not without a trial after issue. *Palmer* case, 12 Fed. (2) 747, is not controlling. Mr. Justice Douglas in *Case* v. *Los Angeles Lumber Co.*, 84 L. Ed. 22, 29, gives an effective answer to the objection in the following words:

> "Hence in this case, the fact that 92.81% in amount of bonds, 99.75% of the Class A stock, and 90% of the Class B stock, have approved the plan is as immaterial on the basic issue of its fairness as is the fact that petitioners own only $18,500 face amount of the large bond issue."

And by the same token the authority of respondent and the right of the trustees or committees to act cannot be used to shield illegal conduct from attack below or on review on relation of anyone adversely affected thereby. *Securities &c* v. *U. S. R. & Imp. Co., supra.*

**D.**

**The Circuit Court misconstrued and misapplied Shaw v. Rd. and Richter v. Jerome.**

The rule there announced that the trustee in a mortgage trust deed represents bondholders secured thereby, applies to collateral proceedings instituted by the complaining bondholders attacking the foreclosure but not to prevent a bondholder from protecting himself from error in the foreclosure especially after decree. And certainly not to prevent a review under Section 262 of respondent's illegal and oppressive action.

(1) *Shaw* v. *Rd. Co.*, 100 U. S. 605, relied on by the Circuit Court, was misconstrued and does not apply to the instant case. The question there was whether the complaining bondholder could maintain a bill of review to set aside the confirmation of sale. The court held that the trustee in the foreclosure represented the bond-

holders and they could not have any relief in the collateral action unless the trustee could. To avoid what the trustee does the bondholders must resort to a remedy other than bill of review. Here petitioners were not only parties to the decree by its express terms but they proceeded directly in the action and not collaterally. Certainly, even if the motives of trustees are as pure as "the driven snow" and the motives of respondent the best, are petitioners to be made to suffer if the respondent and the trustees were in fact mistaken?

(2) *Richter* v. *Jerome,* 123 U. S. 233, is likewise inapplicable because there the complaining bondholder also attempted to make a collateral attack on the foreclosure decree after he had already participated and received his *pro rata* share of the sale under it. This the court rightly held he could not do because he was represented by the trustee. That is a far cry from holding that a bondholder before the damage is done cannot appeal to a court of equity to prevent an obvious wrong and damage to his property. And where it is useless to appeal to the Chancellor, does it not follow petitioners may carry their complaint to the appellate tribunal under Section 262, to control his action if necessary in the interest of justice. There is no other remedy.

## CONCLUSION.

For the Circuit Court, under the circumstances, to leave petitioners remediless is repugnant to every sense of justice and calls for the exercise of this court's power of supervision. It negatives the effect of Judicial Code, Sec. 262 and Sec. 19, Art. 2, of the Illinois Constitution guaranteeing to every person a certain remedy for in-

juries and wrongs without pay or delay. The solution of Chicago's traction problem is not the court's business and should not be permitted to delay indefinitely the final disposition of the questioned foreclosures. Justice delayed is justice denied. On the other hand respondent was in duty bound to hear petitioners' objections to Shaw's appointment and allowance of fees.

Petitioners should *now* be granted such relief as the facts alleged in the petition and admitted in the answer, show they are entitled to. *Goldsmith* v. *Board,* 218 Pac. 296.

Respectfully submitted,

CHARLES P. SCHWARTZ,
*Attorney for Petitioners.*

Office - Supreme Court, U.
FILED
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# No. 450

IN THE

## *Supreme Court of the United States*

OCTOBER TERM, A. D. 1940

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ANNA SCHOMMER, JOHN J. HOROWITZ and MILTON M. ADELMAN, Owners of Certain first mortgage five per cent gold bonds of Chicago Railways Company, and Chicago City Railway Company,

*Petitioners,*

VS.

JAMES H. WILKERSON, Judge of the District Court of the United States, for the Northern District of Illinois, Eastern Division, and the other Judges and Officers of said Court,

*Respondent.*

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## PETITIONERS' REPLY TO RESPONDENT'S BRIEF

---

CHARLES P. SCHWARTZ,
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*Respondent.*

## PETITIONERS' REPLY TO RESPONDENT'S BRIEF

An examination of respondent's reply in opposition to the petition for certiorari discloses a position different from that taken by him in the Circuit Court. Whereas he there filed no brief and made no argument, but only a sworn answer (Tr. 27-9) submitting his action to the Court's judgment on the 16,000 page printed record of the two questioned foreclosures, he now for the first time attempts to raise certain technical objections. These objections are both improper and without merit.

Respondent's position here, and that of the Circuit Court below, would bar all relief under Section 262 of the Judicial Code, calling into question judicial orders

not otherwise reviewable except for active fraud or corruption. An honest effort, they contend, should prevent its re-examination by a higher court, where discretion is involved. The proposition carries its own refutation and was decided otherwise in *Re* Babcock, 26 Fed. (2) 153, and *Bedgisoff* v. *Cushman,* 12 Fed. (2) 667.

The 16,000 page exhibit of respondent's printed record in the two questioned foreclosures prepared under his supervision discloses no reason for the Circuit Court's judgment that the case is complicated. A critical examination of these proceedings will but confirm the charge that the difficulties were of respondent's own making. They could and should have been avoided. The cases should have been disposed of long, long ago; and unless this court invokes its supervisory power they will continue to pend, as they have continued, at respondent's pleasure and the bondholder's expense.

Respondent cannot raise the insufficiency of the form of the petition or procedural matters here for the first time. If the procedural objections to petitioners' motion and petition had been pointed out by respondent or the parties below, leave to meet them would have been asked. The parties did not even appear before respondent on the motion. It was only on the court advisor's motion that respondent acted. The court advisor's action in that respect was certainly self-serving in view of the fact that he was not a party and the propriety of his fees was "under fire."

The admitted facts set forth in the petition certainly more than amply meet respondent's objections to the granting of such relief as petitioners may in law be entitled to. The prayer is a formality and is not controlling. The same is true as to the allegation of previous demand. Where it appears futile, previous demand is unnecessary. So with the allegation of good faith and fraud. The facts in each case control.

A cursory examination of the sixteen volumes of printed record will disclose volumes devoted to pleadings, reports, statements of operations, and briefs unnecessarily incorporated therein. The foreclosures are simple and should have taken up but a fractional part of the record. The voluminousness of the printed record is but another evidence of the profligacy rampant in these foreclosures. The pleadings and orders in the City Railway case filed in 1930 followed those in the Railway case filed in 1927. Yet they are all in the printed record, not once, but twice,—once on the motion for leave and again after leave was granted. The cases were identical and repetition was unnecessary. Again, in the first case the same attorneys represent the trustee and the bondholders' committee, whereas in the second there were two sets of attorneys. The foreclosures like the operation of the mortgaged properties should have been consolidated from the start. The record reeks with waste, delay and disregard of the bondholders' rights.

Since petitioners filed their objections in the District Court on December 26, 1939, the matters complained of still persist and will continue unless this petition is granted. Judicial Code Section 262 should be liberally construed to correct actual or threatened misconduct or abuse of power below.

Respectfully submitted,

CHARLES P. SCHWARTZ,
*Attorney for Petitioners.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

## No. 450

ANNA SCHOMMER, JOHN J. HOROWITZ AND MILTON M. ADELMAN, OWNERS OF CERTAIN FIRST MORTGAGE FIVE PER CENT GOLD BONDS OF CHICAGO RAILWAYS COMPANY AND CHICAGO CITY RAILWAY COMPANY,

*Petitioners,*

*vs.*

JAMES H. WILKERSON, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, AND THE OTHER JUDGES AND OFFICERS OF SAID COURT,

*Respondent.*

## BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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IN THE

# Supreme Court of the United States

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## No. 450

ANNA SCHOMMER, JOHN J. HOROWITZ AND MILTON M. ADELMAN, OWNERS OF CERTAIN FIRST MORTGAGE FIVE PER CENT GOLD BONDS OF CHICAGO RAILWAYS COMPANY AND CHICAGO CITY RAILWAY COMPANY,

*Petitioners,*

*vs.*

JAMES H. WILKERSON, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, AND THE OTHER JUDGES AND OFFICERS OF SAID COURT,

*Respondent.*

## BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

**1. The opinion of the Circuit Court of Appeals is reported in 112 Fed. (2d) 311 (C. C. A. 7th), and also is to be found in the Printed Record, pp. 80-86.**

**2. The jurisdiction is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 938. (28 U. S. C. A. 347a.)**

**3. Statement of the case and question presented.**

Petitioners seek a review of the order of the Circuit Court of Appeals denying their application for a writ of mandamus. The question thus presented is a narrow one and does not require any extended examination of the rec-

ord or consideration of the many complicated questions involved in the Chicago Traction litigation.

The oral motion referred to below in paragraph numbered 1 was made in the three consolidated causes now pending in which receivers were appointed for the four companies comprising the Chicago Surface Lines (the street car system of the city of Chicago), and foreclosure proceedings are pending involving three first mortgages and a collateral trust issue aggregating $113,000,000. Contrary to the contention of petitioner, no plan of reorganization has been declared operative or finally approved. The plan known as the Abbott plan has been tentatively approved. Since the date of such approval, amendments with respect to issuance of securities to provide for unification with the company owning the elevated system have been filed. These amendments will have to be submitted to all security holders and an opportunity afforded to file objections and have a hearing thereon.

So that this court may see the real scope of the present issue, the following is submitted:

1. On January 10, 1940, petitioners made an oral motion in the District Court of the United States for the Northern District of Illinois, Eastern Division, for leave to file a petition, the prayer of which asked the Court to vacate certain orders theretofore entered appointing Walter A. Shaw as Court Adviser and making certain allowances to him as compensation for services rendered, and that he be required to return all moneys theretofore paid him. (Chicago Railways Printed Record in the District Court, p. 6596. This record consists of a number of printed volumes attached to the respondent's answer in the Circuit Court of Appeals as an exhibit, and it was filed with the Clerk of this Court by the petitioners, accompanied by a stipulation waiving printing of it as a part of the record.)

The petition did not ask for leave to intervene in the

proceeding and set up no grounds which would justify the court in permitting intervention.

This is the only petition which the parties ever sought to file and is the only motion ever made by them in the District Court.

2. Hon. Michael L. Igoe, one of the Judges of the United States District Court, after a hearing on this petition on January 10, 1940, entered an order denying leave to file the petition or leave to intervene because (a) no sufficient showing was made to justify intervention, and (b) no benefit would accrue to the estate by allowing intervention, and (c) the bonds held by the petitioners were already represented in the proceeding by a committee and competent counsel. (Chicago Railways District Court Record, 6606.)

3. On February 26, 1940, petitioners filed in the Circuit Court of Appeals for the Seventh Circuit an original petition for mandamus (Supreme Court Record 1). This petition asked for a writ of mandamus compelling the District Judge, to take the following action:

(a) Permit the filing of the petition theretofore presented to the District Court.

(b) Order the execution of the decrees of foreclosure and sale entered May 11, 1936, either by approving or disapproving the reports of sale and, if disapproved, to order new sales.

(c) Allow petitioners to intervene.

The respondent, filed his answer to this petition (Supreme Court Record, 27), and the Circuit Court of Appeals entered an order permitting the parties in interest to appear and file suggestions. These suggestions appear on pages 60-80 of the Supreme Court Record.

It will thus be seen that the relief which petitioners sought in the Circuit Court of Appeals was radically different from that which they sought in the District Court, as was pointed out in the opinion of the Circuit Court of

Appeals (Supreme Court Record, 83). The sole matter involved in the District Court proceeding related to the propriety of Shaw's appointment as Court Adviser and the compensation paid to him. In the Circuit Court of Appeals the petitioners' effort was to secure an order directing the lower court to execute the decrees of sale, a matter which the petitioners had at no time brought up before the District Court.

Entirely apart from the question whether or not the District Court could or should at this stage of the proceeding disaffirm the sales, clearly, the coercive jurisdiction of this court should not be exercised to require a District Court to take some action which the petitioners have never seen fit to ask that court to take. In other words, the petitioners are now asking this court to consider whether or not the District Court should be mandamused to take action in advance of any similar request being made in the District Court itself. The filing of the petition for mandamus in the Circuit Court of Appeals was the first time petitioners had ever raised any question concerning the sales or their confirmation. It is the first time that they have ever taken any position with reference to the pending reorganization plan or any of the proceedings concerning it.

## SUMMARY OF THE ARGUMENT.

The Court of Appeals correctly refused to grant petitioners' writ of mandamus which sought to require the District Court to take action which the petitioners had not first asked that court to take.

The denial by the District Court of petitioners' oral motion for leave to file their petition was proper for several reasons:

*First.* The petitioners failed to comply with Rule 24 of the Federal Rules of Civil Procedure relating to intervention in that they did not file a written motion stating their grounds for intervention.

*Second.* Even if petitioners' application in the District Court be treated as a petition for leave to intervene, it could not form the basis of a valid order for intervention since the petitioners were already adequately represented in the proceedings by the mortgage trustees and the bondholders' committees.

*Third.* The petitioners failed to show when they acquired their bonds or certificates of deposit therefor and the consideration paid for them. And the failure to make that showing is an indication of the lack of good faith that is required in any attempt to intervene.

*Fourth.* The declared and only purpose for which intervention was sought was to impeach orders previously entered and intervention will not be permitted for such a purpose.

*Fifth.* The orders which the petitioners sought permission to attack were in fact valid. Courts of equity have inherent power to call to their help a court adviser.

## THE ARGUMENT.

The law is clear that the Court of Appeals acted correctly in refusing to grant a writ of mandamus requiring the District Court to take action which the petitioners had not first asked that court to take.

*Goldsmith* v. *Board of Tax Appeals,* 270 U. S. 117.

*Edinburg Coal Co.* v. *Humphreys,* 134 Fed. 839 (C. C. A. 7th).

*U. S.* v. *Cox,* 47 Fed. (2d) 988, 990 (C. C. A. 5th).

When action is desired from a Judge of the District Court, the proper procedure is to make an appropriate motion in that court. There all parties to the cause can be heard; evidence introduced and considered; and the Judge who is familiar with the whole record has an opportunity to pass upon the question in an orderly manner. Such method of procedure is in accordance with due process of law. There are no facts alleged in the petition and none exist justifying a departure from the recognized forms of judicial procedure.

Particularly is this true in the case at bar, where the question of executing the decrees of sale and confirming the sales is one which must be decided in the light of the facts as they exist when the action is taken. The status of the franchise negotiations with the City of Chicago changes from day to day and obviously no court can act with intelligence in this matter without having all of the facts before it. The parties are entitled to have a full hearing on all of the extremely complicated questions involved before final action is taken. The petitioners have never taken appropriate action to bring about a hearing on such questions in the District Court.

The petitioners placed great emphasis on the delay in terminating the receivership proceedings. The problem in these foreclosure cases has been not only to reorganize the Chicago Railways Company, the Chicago City Railways Company and the Calumet and South Chicago Railway Company and the other companies comprising the Chicago Surface Lines and the Chicago Rapid Transit Company owning the elevated lines, but to procure from the City Council of the City of Chicago a franchise ordinance which would authorize the purchaser at the foreclosure sales to operate the properties.

The suggestions filed in the Circuit Court of Appeals (Supreme Court Record, 59-80) showing the history of the traction litigation and the opinion of the Circuit Court of Appeals, clearly set forth the facts and reasons for the delay and inability of the District Court Judge to terminate those proceedings in view of the protracted negoiations for an ordinance.

Petitioners also place great emphasis on an enumeration of the allowances which have been made for various fees in this litigation. Since petitioners made no point in their application for mandamus on any fees, other than the objection to the allowance of the fees to the Court Adviser, the matter is not in issue in this proceeding and for that reason the record is silent as to the propriety of these allowances. We merely wish to add the fact that the sum total of the fees allowed, even admitting counsel's computation to be correct is but three-tenths of one per cent of the money collected and disbursed under the supervision of the District Court in these cases. (See Supreme Court Record, 61 and also pages 60 to 80, setting forth the history and background of the Traction litigation, which must be considered at the appropriate time in passing upon the propriety of fees and allowances.)

Entirely apart from the fact that petitioners failed to

ask the District Court for the relief now sought, the denial of the petitioners' motion was proper for several reasons:

*First.* The petitioners failed to comply with Rule 24 of the Federal Rules of Civil Procedure relating to intervention, in that they did not file a written motion stating their grounds for intervention.

*Second.* Even if petitioners' application in the District Court be treated as a petition for leave to intervene, it could not form the basis for a valid order permitting intervention. The District Court, far from abusing its discretion in the matter in refusing leave to intervene, acted in compliance with well-accepted law. The petitioners as holders of certificates of deposit of certain mortgage bonds were already represented in the proceeding by mortgage trustees and their counsel, and by bondholders' committees and their counsel.

The general rule in corporate mortgage foreclosure cases is that if the mortgage trustee is a party to the suit representing all the bondholders, the individual bondholders will not be permitted to intervene unless a showing is made that such representatives are not acting in the proceeding in good faith.

*Shaw* v. *Railroad Co.*, 100 U. S. 605, at 611.
*Richter* v. *Jerome*, 123 U. S. 233, at 246.
*Palmer* v. *Bankers Trust Co.*, 12 Fed. (2d) 747 (C. C. A. 8th).
*Guaranty Trust Company of New York* v. *Minneapolis St. L. R. Co.*, 52 Fed. (2d) 418 (C. C. A. 8th).

The District Court in passing upon the petitioners' application expressly found that the petitioners "were already represented herein by a committee and competent counsel." The Circuit Court of Appeals likewise held that

the petitioners were properly represented in the proceeding (Supreme Court Record, 86).

*Third.* The petitioners failed to show when they acquired their bonds or certificates of deposit therefor and the consideration paid for them. And the failure to make that showing is an indication of the lack of good faith that is required in any attempt to intervene.

*Fourth.* The declared and only purpose for which intervention was sought was to impeach orders previously entered.

The orders sought to be impeached were those previously entered appointing Walter A. Shaw as Court Adviser, authorizing him to employ legal and engineering assistance and allowing payment for his services and expenses. Intervention will not be permitted for any such purpose.

*U. S.* v. *California Cooperative Canneries,* 279 U. S. 553.

*Rheinberger* v. *Security Life Ins. Co.,* 72 F. (2d) 147 (C. C. A. 7th).

*Fifth.* The orders, which the petitioners sought permission to attack, were in fact valid.

It has long been the rule that courts of equity in administering estates may call to their help commissioners, auditors, accountants, appraisers, advisers and investigators.

*Ex Parte Peterson,* 253 U. S. 300.

*In Re Utilities Power and Light Corporation,* 90 Fed. (2d) 798 (C. C. A. 7th).

## THE REASONS RELIED ON BY THE PETITIONERS FOR THE ALLOWANCE OF THE WRIT.

Petitioners do not claim that the Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this court.

The three theories they advance to justify the exercise of this court's issuance of the writ are as follows:

### A. The Contention That the Ruling of the Circuit Court of Appeals Is Inconsistent With Four Decisions Is Incorrect.

It is contended that the decision is inconsistent with the following cases.

(1) The case of *Toler* v. *E. Tennessee Ry. Co.*, 67 Fed. 168 (C. C., Tenn.), is a decision of a *nisi prius* court, which does not deal with any question of fees paid the Court Adviser or with bondholders right of intervention following a foreclosure decree. It dealt with the right of a majority of the outstanding bonds to intervene for the purpose of objecting to foreclosure by the trustee.

(2) *Gregory* v. *Pike*, 67 Fed. 837 (C. C. A. 1st), deals with rights of new parties, who came into the case by virtue of the decree, to intervention. It has no bearing on the instant case.

(3) The case of *Howard* v. *Shinn*, 190 Fed. 940 (C. C. A. 9th), permitted intervention in a case in which the same trustee having been named for different sets of bondholders consented to a decree which gave the junior bondholdholders priority of lien over the senior bondholders.

(4) The case of *Williams* v. *Morgan,* 111 U. S. 684, deals with the rights of purchasers at a railroad foreclosure sale to intervene and to object to the allowances requested by the trustees and receivers.

It is obvious that no one of these cases is in anywise analogous to the case at bar. On the other hand the decision of the Circuit Court of Appeals is in exact accord with the decisions of the Circuit Court of Appeals for the 8th Circuit, in *Palmer* v. *Bankers Trust Co.,* 12 F. (2d) 747, and in *Guaranty Trust Co. of New York* v. *Minneapolis St. L. R. Co.,* 52 Fed. (2d) 418.

**B. The Contention That the Decision of the Circuit Court of Appeals Erroneously Construed and Misapplied the Law in Two Decisions of This Court as Controlling Is Incorrect.**

Petitioners contend that the Circuit Court of Appeals misconstrued and misapplied the decisions of this court in *Shaw* v. *Railroad Co.,* 100 U. S. 605, and *Richter* v. *Jerome,* 123 U. S. 233. A reference to the decision of the Circuit Court of Appeals will show that the cases cited were simply to sustain the proposition that the petitioners in this case were represented by the mortgage trustees, and that being represented they were not entitled to intervene in the absence of proof that they were not adequately represented by such trustees.

It is asserted by counsel for the petitioners that with reference to intervention a different rule should apply after the decree than that which is applicable before the decree. No reason for this is cited and no authority sustains this contention.

Petitioners contend that they are parties by the express terms of the decrees entered in the proceedings in

the case at bar. Reliance is placed upon a quotation made from the decree of foreclosure to the effect that the term "party" as used in the decree "is intended and shall be deemed to mean and include all holders of bonds." This quotation like other isolated quotations is completely distorted by the fact that the entire context of the quotations is not set forth. And upon turning to the article of the decree from which it is quoted, we find that that article provided for an injunction to protect the purchaser of the property against the subsequent action of any party. Of course, such an injunction would be useless if it did not run against the parties by representation as well as against the named parties. The bondholders fall in the first class. To leave the language "any party" without definition might lead to some contention in the future that the injunction was not intended to cover represented parties but only named parties, and hence, the definition. The Bondholders' position was not thereby changed from a party by representation to a named party.

### C. The Contention That the Circuit Court of Appeals Should Review the Plan in Advance of Its Confirmation by the District Court Is Contrary to the Accepted and Usual Course of Judicial Proceedings.

In an attempt to bring themselves within the language of the rules of this court, concerning reasons for granting writs of certiorari, the petitioners argue that the District Court's denial of petitioner's right to intervene is a departure from accepted and usual course of judicial proceedings calling for an exercise of this court's supervisory power.

The contention is that it is illegal for the lower court to pass upon a plan of reorganization and that such ille-

gality can be reviewed in a mandamus proceeding. In support of their contention, they cite two decisions of the Supreme Court which clearly do not support this position.

The first case is *The First National Bank* v. *Flershem,* 290 U. S. 504, and the second case is *Case* v. *Los Angeles Lumber Co.,* 308 U. S. 106. The facts in these cases are entirely different from those of the case at bar and they have no relevancy to the question here presented.

Petitioners have not established any reason which brings them within the rules of this court justifying the issuance of a writ of certiorari.

The conclusion of the Circuit Court of Appeals in this case that the "unusual delay is the result of the stupendous problem with which the court and interested parties have been confronted" (Supreme Court Record, 86) is conclusively demonstrated by the record. (See Supreme Court Record, 59-80.) The complexities are many, including an unprecedented financial depression, the difficulty of securing a proper franchise from a municipality, and a major transformation in metropolitan transportation. The final solution has on several occasions almost been attained. It has been lost by fortuitous circumstances beyond the control of the security holders or the court.

No good purpose can be served at this time by a review of the decision of the Circuit Court of Appeals. No plan of reorganization has been finally approved; amendments to the pending plan will have to be submitted to the security holders and an opportunity for filing objections will be afforded at the appropriate time. When the plan comes before the court for final decision the petitioners will have their day in court and the right to a further hearing on any question affecting them.

We therefore respectfully ask that petitioners' application for a writ of certiorari be denied.

Respectfully submitted,

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